

# Torts I Outline

Lewis & Clark Law School  
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**R**ight on the law.

**R**elevant

**R**easonable

Not **R**epetitive

*You got this.*

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# Intentional Torts

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## Battery

Jurisdictionally Single or Dual Intent  
Trespassory Tort

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### NO PHYSICAL HARM REQUIRED<sup>1</sup>

*The definitions below do not incorporate transferred intent doctrines; apply them separately. See page 7.*

*Children are liable for the purpose of the exam WITHIN the exceptions and rules for adolescents. Parent negligence is weak and vicarious or strict liability do not apply UNLESS a statute is given.*

A plaintiff must demonstrate BOTH the intent and action/result elements.

### **I. Intent: Defendant must intend to (1) cause a contact with the plaintiff (2) that is harmful or offensive.**

SINGLE INTENT = (1) ONLY; DUAL INTENT = (1) & (2)

1. The intent to contact is satisfied if the defendant **either**:
  - a. Desires to cause the contact; or
  - b. Knows with substantial certainty that the contact will occur.
2. An intent to cause a contact that is (a) harmful or (b) offensive is shown if the defendant **either**:
  - a. Desires to harm, or is substantially certain the contact will harm, the plaintiff; or
    - i. The Substantial Certainty Test: Requires that the person allegedly committing battery knew with substantial certainty that the action would cause harm.
    - ii. Intent to inflict personal injury not strictly required.<sup>2</sup>
    - iii. See definition of harm in section (II)(3)(a).
  - b. Desires to offend the plaintiff or is substantially certain the contact will offend a reasonable sense of personal dignity, i.e. it would be offensive to an ordinary, reasonable person under the circumstances.
    - i. If the contact would not offend a reasonable person's sense of personal dignity, and the plaintiff is simply hypersensitive, the contact nevertheless becomes "offensive" if the defendant is aware of the plaintiff's hypersensitive. This changes the substantial-certainty inquiry from

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<sup>1</sup> CB 39

<sup>2</sup> *Snyder v. Turk*, 627 NE2d 1053 (1993).

objective to subjective: did the defendant know with substantial certainty that the plaintiff would be offended.

## **II. Action/Result: The defendant must actually (1) cause the (2) contact to result and (3) the contact must be harmful or offensive.**

1. The defendant can cause the contact either directly or indirectly.
  - i. Contact includes particulate matter that can make contact with another person.<sup>3</sup>
2. An actual contact must occur with the plaintiff's body or with items closely associated with the plaintiff's body or personhood.
3. The contact must be (a) harmful OR (b) offensive.
  - a. A contact is *harmful* if it is a physical impairment of the condition of the plaintiff's body, including physical injury, illness, or death.
  - b. A contact is *offensive* if it would offend a reasonable sense of personal dignity, i.e. it would be offensive to an ordinary, reasonable person under the same circumstances.
    - i. If the contact would not offend a reasonable person's sense of personal dignity, and the plaintiff is simply hypersensitive, the contact nevertheless becomes "offensive" if the defendant is aware of the plaintiff's hypersensitivity.

## **Assault** Dual Intent

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$\partial$  must have (1) intended to cause (2) apprehension of an imminent (i) harmful, or (ii) offensive contact.

### **I. Intent**

Intent is satisfied if  $\partial$  either;

- a. Desires to cause the apprehension; or
- b. Knows with substantial certainty that the apprehension will occur.

### **II. Apprehension**

Plaintiff must (1) actually and (2) reasonably apprehend an imminent (i) harmful, or (ii) offensive contact.

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<sup>3</sup> *Liechtman v. WLW Jacor Communications Inc.*, 634 NE2d 697

### **Restatement 2d of Torts § 35 | False Imprisonment**

1. An actor is subject to liability to another for false imprisonment if:
  - a. They act intending to confine the other or a third person within boundaries fixed by the actor, AND
  - b. Their act directly or indirectly results in such a confinement of the other, AND
  - c. The other is conscious of the confinement or is harmed by it.

*Exception to (c): Negated if an unconscious victim sustains actual harm.*

### **Restatement 2d of Torts § 36 | What Constitutes Confinement**

1. To make the actor liable for false imprisonment, the other's confinement within the boundaries fixed by the actor must be complete.
2. The confinement is complete although there is a reasonable means of escape, unless the other knows of it.
3. The actor does not become liable for false imprisonment by intentionally preventing another from going in a particular direction in which he has a right or privilege to go.

Confinement can be:

- (1) physical barriers, or
- (2) physical force, or
- (3) implicit OR explicit threat of physical force, or
- (4) false assertion of legally authority to confine, or
- (5) duress of goods.

Aiding, Abetting and Inducement: A person who (1) instigates confinement or (2) induces another to (3) unlawfully confine another may be subject to liability.

Special Exception: A police officer falsely arresting a citizen is not the tort of false imprisonment but instead is false arrest.

## Trespass to Land

Trespassory & Continuing Tort  
Single Intent with No Bad Faith Needed

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Plaintiff must prove (1) an ownership or possessory interest in the land AND an (2) intentional AND (3) tangible (i) invasion, (ii) intrusion, OR (iii) entry (4) by defendant onto the land.

**Single Intent:** The trespasser need ONLY to intend *to enter the land*, not to trespass on the land nor to have been reasonably able to foresee harm.

## Trespass to Chattel

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### Restatement 2d of Torts § 217 | Ways of Committing Trespass to Chattels

1. A trespass to a chattel may be committed by intentionally
  - a. Dispossessing another of the chattel, or
  - b. Using or intermeddling with a chattel in the possession of another.

### Restatement 2d of Torts § 218 | Liability to Person in Possession

1. One who commits a trespass to a chattel is subject to liability to the possessor of the chattel if, BUT ONLY IF:
  - a. They dispossess the other of the chattel, OR
  - b. The chattel is impaired as to its condition, quality, or value, OR
  - c. The possessor is deprived of the use of the chattel for a substantial time, OR
  - d. Bodily harm is caused to the possessor, or harm is caused to some person or thing in which the possessor has a legally protected interest.

**Intent:** The defendant must act with the intention of interfering with the property or with knowledge that such interference is substantially certain to result.

**Harm:** The owner's materially valuable interest in the physical condition, quality, or value of the chattel, or if the owner is deprived of the use of the chattel for a substantial time.<sup>4</sup>

**Note:** Some courts have held that clogging a company's email server or computer systems with large amounts of unwanted emails OR other electronic interference *may* count as trespass to chattel.

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<sup>4</sup> Restatement (Second) of Torts § 218, Comment E

## Transferred Intent

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*All stem from the original writ of trespass.*

1. Intend to commit a tort against person A but commit tort against person B
2. Intend to hit person A but miss, transfer from tort to tort and person A could claim different tort even though intent was first tort.
  - a. Ex: Intend to hit someone with elbow but miss, transfer battery intent to assault.  
They can overlap.

### Person

1. Battery
2. Assault
3. False imprisonment

### Property

4. Trespass to land
5. Trespass to chattels

3. Doctrine of transferred intent
  - a. The only requirement is that one intends (dual intent) to commit battery, even if that unintentionally results in the 'wrong person' being battered. (*Baska v. Scherzer Kan. 2007*)

## Conversion of Chattels

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### Restatement 2d of Torts § 222A: What Constitutes Conversion

1. Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel.
2. In determining the seriousness of the interference and the justice of requiring the actor to pay the full value, the following factors are important:
  - a. The extent and duration of the actor's exercise of dominion or control;
  - b. The actor's intent to assert a right in fact inconsistent with the other's right of control;
  - c. The actor's good faith; [questionable]
  - d. The extent and duration of the resulting interference with the other's right of control;
  - e. The harm done to the chattel;
  - f. The inconvenience and expense caused to the other.

Conversion may be accomplished by aiding and abetting another's conversion, which includes *bona fide purchasers*.

Traditionally only applied to physical property only but has been relaxed in modern common law. Intangible chattels (i.e. intellectual property) can be subject to conversion claims.

Conversion depends on the jurisdiction, Oregon recognizes. unless says otherwise.

# Affirmative Defenses & Privileges to Intentional Torts

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## Self-Defense & Defense of Others

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An actor may intentionally:

1. Use force against another person (P);
2. Cause an apprehension of imminent harmful or offensive contact to another (P); OR
3. Imprison or confine another person (P)

### I. When Privilege is Triggered

**IF** you actually and *reasonably believe* that another person is intentionally or negligently either;

1. Imminently going to cause a harmful or offensive contact to yourself or a third person; or
2. Imminently going to confine or imprison yourself or a third person.

**II. Force That May Be Used:** You may only use an amount of force OR confinement that is *reasonably necessary* to prevent or repel the impending contact or confinement.

1. You may threaten to use (but not actually use) an amount of force or confinement that would exceed what is reasonably necessary.

**III. When Retreat is Necessary:** In some cases, if a safe and reasonable retreat is available, you must retreat, rather than stand and defend yourself.

1. If the impending threat is one that would not – in the mind of a reasonable person – cause death or serious bodily injury, you may stand your ground and defend yourself with whatever is permitted under § II: No retreat necessary.
2. If the impending threat is one that could cause death or serious bodily injury – in the mind of a reasonable person – and there is a safe and reasonable retreat available, then:
  - a. In most jurisdictions, you must (1) use that escape, (2) limit your actions to threats intended to cause apprehension, or (3) limit your use of actual force or confinement to something less than that intended or likely to cause death or serious bodily harm.
    - i. Unless you are in your home, in which case you may use force or confinement intended or likely to cause death or serious bodily harm.
  - b. In some “frontier” jurisdictions, you may stand your ground and defend yourself and use force or confinement intended or likely to cause death or serious bodily harm.
3. In some jurisdictions, if you are aware that the impending harm is one only negligently made by the person, you must retreat if it is safe and reasonable to do so.



## Defense & Repossession of Property

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1. A possessor of land has no privilege to use force
  - a. Intended or likely to
  - b. Cause death or
  - c. Serious harm
2. Against another whom the possessor sees about to
  - a. Enter their premises or
  - b. Meddle with their chattel,
3. UNLESS the intrusion threatens death or serious bodily harm.<sup>5</sup>

Any privilege to regain possession of chattels is limited; in general, the owner must resort to the courts for a remedy rather than using self-help. If the  $\partial$  acts in “fresh pursuit,” however, they are privileged to use reasonable force to defend possession. This privilege is **lost** if the  $\partial$  is **mistaken** about the need for force.<sup>6</sup>

One who reasonably believes that another has tortiously taken a chattel upon their premises, or has failed to make cash payment for a chattel purchased or services rendered there, is privileged, without arresting the other, to detain them on the premises for the time necessary for a reasonable investigation of the facts.<sup>7</sup>

Reasonable force may be used to detain the person; but... the use of force intended or likely to cause serious bodily harm is never privileged for the sole purpose of detention to investigate, and it becomes privileged only where the resistance of the other makes it necessary for the actor to use such force in self-defense. In the ordinary case, the use of any force at all will not be privileged until the other has been requested to remain; and it is only where there is no time for such a request, or it would obviously be futile, that force is justified.<sup>8</sup>

## Discipline Privileges

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Some states refuse to permit **children** to sue their **parents** for torts. Where children are permitted to sue parents, parents still enjoy a privilege to discipline, and to use force and confinement to do so.<sup>9</sup> Parents may use reasonable force as they reasonably believe necessary.<sup>10</sup> Those who are in charge of someone else’s children also enjoy a similar privilege. However, it may be that they do not enjoy the same latitude for punishment as the parents do.<sup>11</sup>

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<sup>5</sup> Restatement of Torts § 85; CB79

<sup>6</sup> Dobbs, Hayden & Bublick, *The Law of Torts* § 91 (2d ed.); Restatement (Second) of Torts §§ 100 & 103

<sup>7</sup> Restatement of Torts § 120A; CB83

<sup>8</sup> Restatement of Torts § 120A, comment h; CB85

<sup>9</sup> CB87

<sup>10</sup> Restatement (Second) of Torts § 147

<sup>11</sup> CB88

1. Actual or Apparent
  - a. Negated by
    - i. Incapacity<sup>12</sup>
      1. Minors
        - a. Not a blanket rule, courts examine the facts
          - i. Experience and intelligence of the minor
          - ii. Age
        - b. Court split: Minors may consent to a number of touchings appropriate to their age.
      2. Adults
        - a. Typically established only by showing:
          - i. The adult could not manage their own affairs; OR
          - ii. Did not understand the nature and character of the act.
            1. Ex: Autistic persons
      - ii. Duress
        1. Physical
        2. Economic (more theoretical because statutes rendering this claim under torts highly unlikely)
      - iii. Special/Power Relationships<sup>13</sup>
        1. Jailer-detainee
        2. Mental health provider-patient
          - a. *Statutorily made!!*
        3. Employer-employee
          - a. *Statutorily made!!*
        4. Others?
      - iv. Exceeded
        1. The consent given was limited in scope and the character of the act fell outside of the scope of granted consent.
          - a. Medical Battery**
            - i. A physician commits a battery if they perform a substantially different treatment from that covered by the patient's expressed consent.
              1. Ex: The blood transfusion from only family members
          2. Not limited to medical issues
            - a. CB example of parents consenting to their learning-disabled child to be placed in a time-out room without knowledge of the poor conditions of the room in question.
      - v. Revoked

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<sup>12</sup> CB91

<sup>13</sup> CB90-91

1. Subject only to the slightest qualification, the plaintiff can revoke consent at any time by communicating the revocation to the defendant.<sup>14</sup>
- vi. Emergency
  1. Consent may not apply as a defense in circumstances where;
    - a. A doctor must act in an emergency and obtaining consent is not possible and no one else authorized to give consent is available.
2. General Consent
  - a. Courts often say that the specific controls the general with exceptions.
    - i. Medical necessity may negate the specific consent of a patient when a general consent was given.
3. Contractual Consent
  - a. The majority of states hold that public policy precludes enforcement of a release that would shelter aggravated (intentional) misconduct.<sup>15</sup>

## **Defense of Necessity**

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### **I. Public Necessity**

1. An actor may commit an act that would otherwise constitute;
  - a. Trespass to land; or
  - b. Trespass to chattels; or
  - c. Conversion of chattels
2. In order to prevent an imminent disaster to the community affecting
  - a. Real property or
  - b. Personal property or
  - c. Persons
3. **IF** the action taken is reasonable.

Public necessity is a complete defense at common law and will trump other people's privileges.

### **II. Private Necessity**

1. An actor may commit an act that would otherwise constitute;
  - a. Trespass to land; or
  - b. Trespass to chattels; or
  - c. Conversion of chattels
2. To prevent imminent harm to
  - a. themselves or
  - b. their property or
  - c. to a third person or
  - d. their property
3. **IF** the action taken is reasonable.

Private necessity overcomes defense of property; if no damage occurs to the property, it is a complete defense but if property damaged, not a complete defense and damages must be paid.

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<sup>14</sup> CB95

<sup>15</sup> CB319 Note 6

# Prima Facie Case of Negligence

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*Negligence is conduct that creates unreasonable risks that a reasonable person would avoid [and harm actually occurs]. The risk of harm is unreasonable when a reasonable and prudent person would foresee that harm might result and would avoid conduct that creates the risk.*

*Conduct may include a failure to act if action is required, but a mere state of mind is not conduct.<sup>16</sup>*

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## The General Elements



**Burden < Probability + Loss**  
*Sans Med Mal*

*Plaintiff bears the burden of proof on the following elements of the prima facie case.*

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<sup>16</sup> *Torts and Compensation*, Dobbs, Hayden & Bublick (CB), page 141.

# Duty

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*The issues of whether a (1) duty exists and, if so, what the (2) applicable standard of care is, are generally legal determinations for the judge only, with few exceptions.*

## Duty

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*A duty always exists unless a no duty rule applies*

### I. Does a Duty Exist?

1. Duty existing is a binary question: Yes or No.
  - a. The answer is always yes;
    - i. Unless a **no duty** rule exists.
      1. **Lessors (Duties owed to tenants and their guests, i.e. licensees and invitees)**
        - a. Traditional Rule and its Exceptions:
          - i. Lessors owe NO DUTY to their own tenants and the tenant's guests (i.e. licensees and invitees)
            1. Landowners owe no duty to trespassers.
              - a. The lessor might as the possessor.
          - ii. Exceptions which impose a duty to act with reasonable care:
            1. If the landlord has contracted to repair defects, and landlord learns about the defect;
            2. If the landlord knows or has reason to know that a defect exists at the time the tenant takes possession, and the lessee does not know or have reason to know of the defect;
            3. If the premises are specifically leased for public use;
            4. If the premises are retained in the landlord's control;
              - a. Ex: Hallways in apartment buildings. Exterior of apartment buildings included in scope of landlord's control.
            5. If the landlord repairs something on the premises.
              - a. Whether or not they have a contractual obligation.
        - b. Discarding the traditional rule and its exceptions:
          - i. Lessor owes a duty to its tenant and the tenant's guests [i.e. licensees and invitees] to act with reasonable care.
      2. **Nonfeasance: The No-Duty-to-Act Rule**
        - a. Traditional Rule and its Exceptions
          - i. No duty to act in cases involving **nonfeasance**.

1. Courts have incorrectly included **misfeasance** into this rule.
- ii. *Exceptions or qualifications* which impose a duty to act with reasonable care:
  1. Defendant knows or has reason to know their conduct, whether innocent or tortious, has already caused some harm to the plaintiff.
  2. Defendant does an act, whether tortiously or innocently, which they subsequently realize or has reason to realize creates an unreasonable risk of harm to plaintiff.
  3. Statute imposes the duty: Good Samaritan Statutes
  4. **Assuming the Duty**: Defendant takes charge of assisting or caring for plaintiff;
    - a. Negates:
      - i. No duty to rescue
  5. Defendant and plaintiff are in a special relationship. Relationships;
    - a. A common carrier and its passengers;
    - b. An innkeeper and its guests;
    - c. A business or possessor of land that holds its land open to the public with those lawfully on the land;
    - d. An employer with its employees, who while at work are either in imminent danger or are injured or ill and thereby rendered helpless;
    - e. A school with its students;
    - f. A landlord with its tenants;
    - g. A custodian with those in custody, IF the custodian has superior ability to protect the plaintiff.
    - h. The “Bro” relationship (Co-Adventurers)
      - i. Embark on a co-adventure.
      - ii. Only applies to nonfeasance.
  6. Defendant has made certain promises; contractual obligations.
3. **No Duty to Protect from Third Persons**
  - a. Basic Rule: Defendant owes no duty to protect plaintiff from third persons regardless of whether the defendants conduct constitutes **nonfeasance or misfeasance**.
    - i. Often nonfeasance but can be misfeasance.
      1. Debate in legal community on whether this is a no duty rule under nonfeasance or its own standalone rule.
  - b. Exceptions:
    - i. Statutorily imposed duty
    - ii. Undertakings to do so; promises

- iii. Special relationships;
  - 1. Between defendant and plaintiff:
    - a. A common carrier and its passengers;
    - b. An innkeeper and its guests;
    - c. A business or possessor of land that holds its land open to the public with those lawfully on the land;
    - d. An employer with its employees, who while at work are either in imminent danger or are injured or ill and thereby rendered helpless;
    - e. A school with its students;
    - f. A landlord with its tenants;
    - g. A custodian with those in custody, IF the custodian has superior ability to protect the plaintiff.
  - 2. Between defendant and third person:
    - a. Employer-employee with *facilitation*;
      - i. Position has to have some play in the tortious act.
      - ii. Can bring both negligence and respondeat superior.
    - b. Custodian-ward;
      - i. Exception to the exception: state/probation officer.
    - c. Parent-dependent, minor child;
      - i. Specific dangerous habit not necessary element for exam.
    - d. Therapist-patient;
      - i. There has to be an identifiable victim.
  - iv. Negligent entrustment of chattel
    - 1. Such as a weapon or keys to a drunk person.
  - v. Commercial vendors of alcohol for on premises consumption.
- 4. **No Duty to Rescue**
  - a. The Rescue Doctrine<sup>17</sup>
    - i. One who sees a person in imminent danger caused by the negligence of another cannot be charged with contributory negligence UNLESS
      - 1. The rescuer assumed the duty, AND
      - 2. Acted recklessly. **Misfeasance**.
    - ii. After comparative negligence, courts will sometimes leave the allocation of fault between the defendant and rescuer plaintiff to the jury.
- 5. **Prenatal Duties and No Duty Rules**
  - a. Child born alive with a prenatal injury:

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<sup>17</sup> CB308 § 6

- i. Mother: Likely owes a duty, split.
      - ii. Third party defendant: Duty owed unless other no duty rule.
    - b. Child stillborn from prenatal injury:
      - i. Mother: Likely no duty owed.
      - ii. Third party defendant: Duty owed if viable at the time of injury unless other no duty applies.
    - c. Pregnant mother's personal injury
      - i. Third party defendant: Duty owed unless other no duty applies.
    - d. Child's prenatal injury due to mother's preconception injury:
      - i. Third party defendant: Duty owed unless other no duty applies.
6. **Pharmacists**
- a. Owe no duty to:
    - i. Warn of side effects,
    - ii. If the physician prescribed too high a dosage, OR
    - iii. That a drug is counter indicated, even though the patient may be seriously injured if the prescription is filled.

b. No

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## Standard of Care

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*IF a duty exists, the standard of care must then be determined, generally as a matter of law with few exceptions.*

### I. What is the Standard of Care?

*The standard is to act as a reasonable person would in the same or similar circumstances;*

## II. UNLESS

1. **Jury Instructions:** The judge modifies it.
  - a. The defendant may be entitled to "excuse" instruction; *see II(3)(c)(i)-(iii)*.
  - b. Other times the standard is not modified but the evidence which may be admitted on breach to satisfy the standard is broadened.
    - i. Ex: Superior Knowledge
2. **Sports Personal Injury:** The standard of care, in a growing number of jurisdictions, is changed to be that "personal injury cases arising out of an athletic even must be predicated on reckless disregard of safety."<sup>18</sup>
  - a. Under "Assumption of Risk"
3. **Negligence Per Se:** It is provided by statute or regulation.
  - a. The standard of care is set by a statute.
    - i. The judge determines whether Negligence Per Se is applicable.
  - b. Is plaintiff entitled to a negligence per se instruction? (The judge decides all of the following issues.)
    - i. Does the statute fail to provide for a private, civil cause of action?

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<sup>18</sup> *Gauvin v. Clark*, 537 NE2d 94 (Mass. 1989), CB326 n1.



- ii. Does the statute set forth a specific and particular standard of conduct?
  - iii. Is the statute designed to protect against the type of harm that occurred?
  - iv. Is the statute designed to protect a class of persons of which the victim belongs?
  - c. Is the defendant entitled to an excuse instruction?
    - i. Judge decides which excuses, if any, are legally recognized jurisdictionally.
    - ii. The jury decides whether the statute violation is excused, unless there is no triable issue of fact.
    - iii. The Restatement (Third) of Torts: Liability for Physical Harm
      - 1. § 14: Statutory Violations as Negligence Per Se
        - a. An actor is negligent if, without *excuse*, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.
      - 2. § 15: Excused Violations
        - a. An actor's violation of a statute is excused and not negligence IF:
          - i. The violation is reasonable in the light of the actor's childhood, physical disability, or physical incapacitation.
          - ii. The actor exercises reasonable care in attempting to comply with the statute;
          - iii. The actor neither knows nor should know of the factual circumstances that render the statute applicable;
          - iv. The actor's violation of the statute is due to the confusing way in which the requirements of the statute are presented to the public; OR
          - v. The actor's compliance with the statute would involve a greater risk of physical harm to the actor or to others than noncompliance would.
4. **Med Mal:** Medical custom sets the standard of care and is established by expert witnesses. A physician must exercise that degree of care, skill, and proficiency exercised by reasonably careful, skillful, and prudent practitioners in the same class to which they belong, acting under the same or similar circumstances.<sup>19</sup>
  - a. Turns into a factual question for the jury.
  - b. Instances of common knowledge may not require expert witnesses.
    - i. This includes **Medical Res Ipsa**.
      - 1. See page 25.
  - c. **Physicians**
    - i. Expert Witness Locality Rules
      - 1. Strict Locality: Courts don't use anymore but was when the expert witness needed to be from the same locality as the defendant.
      - 2. Modified Locality: Expert witness most come from similar markets.
      - 3. National Medical Standard: Expert witness can be from anywhere in the U.S. to give what the national standard is.

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<sup>19</sup> CB400

- a. Multiple expert witnesses are possible
        - i. Jury decides which standard to use when this happens.
          - 1. They can permit more than one medical standard from different witnesses.
        - ii. **IF** the physician can't do what the industry standard is, their standard of care becomes referring patients to another physician, expert, or facility that can.
        - iii. The expert **MUST** practice in the same area of medicine.
          - 1. Not constrained by title of MD.
            - a. Ex: Neuro and Orthopedic surgeons both perform spinal surgery.
          - 2. **IF** the defendant presented themselves as an MD, they receive the standards as outlined above.
  - d. **Nonmedical practitioners**
    - i. Standard is established by the school of belief that they profess, not medical standards.
  - e. **Nurses**
    - i. Nurses are held to the standard of nurses in a similar practice.
  - f. **Hospitals**
    - i. Owe a duty of reasonable care under national standards fixed by the Joint Commission on Accreditation of Hospitals.
  - g. **Specialists**<sup>20</sup>
    - i. Specialists are held to the standard of their specialties.
      - 1. Most courts disregard locality rules for specialists.
5. **Landowners/Possessors (but not lessors):** Duties owed to persons on land
  - a. Common Law "Status" Approach
    - i. **Trespassers**
      - 1. Undiscovered trespassers: Reduced standard of care.
      - 2. Discovered/frequent trespassers: Reasonable standard of care.
        - a. Discovered: Defendant (1) knows or from facts within their knowledge should have known (has reasons to know) that plaintiff was on the property AND (2) knows or from facts within their knowledge should have known (has reasons to know) that plaintiff was at risk of harm.
        - b. Frequent: Defendant (1) knows that an area of their land is frequently used by trespassers and (2) knows that a trespasser could encounter a risk of harm there.
      - 3. Child trespassers: Reasonable standard of care **IF** attractive nuisance.
    - ii. **Licensees**
      - 1. Undiscovered licensees: Reduced standard of care.
      - 2. Discovered/frequent licensees: Reasonable standard of care.
        - a. Discovered: Defendant (1) knows or from facts within their knowledge should have known (has reasons to know) that plaintiff was on the property AND (2) knows or from facts

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<sup>20</sup> CB402 Notes 1-2

within their knowledge should have known (has reasons to know) that plaintiff was at risk of harm.

- b. Frequent: Defendant (1) knows that an area of their land is frequently used by licensees and (2) knows that a licensee could encounter a risk of harm there.

3. Child licensees: Reasonable standard of care **IF** attractive nuisance.

**iii. Invitees**

1. Reasonable standard of care.

- b. Rejecting the Status Approach and Using Reasonable Standard of Care
  - i. For all persons, regardless of entrant status; or
  - ii. For all persons, regardless of entrant status EXCEPT trespassers.

**6. Common Carriers**

a. Standard of care becomes heightened standard.

**7. Host Drivers**

- a. Reduced
- b. Statutory

**8. Children**

a. Age, maturity and intelligence

## Breach

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*The question of breach is an issue for the fact finder, unless there is no triable issue of fact.*

***Burden < Probability + Loss***

*Heavy lifting for plaintiffs here.*

### **I. Did the defendant(s) breach their duty to use the standard of care proscribed?**

1. Defendant must have created an unreasonable risk of harm in light of the applicable standard.
  - a. Typically determined with a BPL analysis.
  - b. Various tools can be used to help the fact finder evaluate whether this is the case.
2. Proving the underlying conduct.
  - a. Generally
    - i. Burden of proof on the plaintiff
    - ii. Standard of proof: preponderance of the evidence.
  - b. Evidence
    - i. Generally
    - ii. Direct evidence: evidence that can be factually proven.
    - iii. Circumstantial evidence: evidence that can be inferred from direct evidence.
  - c. Common knowledge vs. expert testimony
3. Evaluating the Underlying Conduct to Determine if it Constitutes an Unreasonable Risk
  - a. Common knowledge vs. expert testimony
  - b. Defendant's own rules of conduct
  - c. Industry custom
4. **Negligence Per Se:** Breach is determined without a BPL analysis.
  - a. Did the defendant violate the duty and standard set by the statute as interpreted by the judge (without a legally recognized excuse)?
    - i. Binary question: Yes or no.
    - ii. The jury decides whether defendant has violated the statute as interpreted, unless there is no triable issue of fact.
5. **Med Mal:** Breach is determined without a BPL analysis.
  - a. Did the defendant do what the expert witness(es) set as the standard via medical custom?
    - i. Binary question: Yes or no.

## Legally Cognizable Harm

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*Harm is a mixed question of fact and law. Whether the plaintiff has actually suffered any harm is an issue for the fact finder, unless there is no triable issue of fact. But whether the harm suffered is legally cognizable – that is to say, one the law will recognize – is an issue for the judge only.*

### I. Did the plaintiff suffer a legally cognizable harm?

1. Traditionally, the plaintiff must suffer an actual:
  - a. Injury, or
  - b. Harm, or
    - i. Ex: Chemical leaks into neighborhood<sup>21</sup>
  - c. Damage; to
    - i. Self, or
    - ii. Property.
2. Re-conceptualizing harm because of causation problems;
  - a. Economic harm
  - b. **Med Mal:**
    - i. Loss of Chance
      1. Loss of a chance is a cognizable injury that permits plaintiffs to recover for the loss of an opportunity for a better outcome.
      2. Proportional Damages & Quantified Value of the Chance
        - a. Rather than full damages for the adverse outcome, the plaintiff is only compensated for the lost opportunity.
          - i. The lost opportunity may be thought of as the adverse outcome discounted by the difference between the ex ante (based on forecasts rather than actual results) probability of the outcome in light of the defendant's negligence and the probability of the outcome absent the defendant's negligence.
        - b. May include loss of earnings
    - ii. **Medical Res Ipsa:**
      1. The normal basis for medical res ipsa is that, as a matter of common knowledge, the plaintiff's injury is more likely than not to have resulted from negligence.<sup>22</sup>
        - a. Expert testimony may be used to help bridge the gap between the jury's common knowledge and the common knowledge of physicians.<sup>23</sup>
      2. Where a plaintiff receives unusual injuries while unconscious and in the course of medical treatment, all those defendants who had any control over the patient's body or the instrumentalities which might have caused

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<sup>21</sup> CB207 Note 2

<sup>22</sup> CB409 Note 1

<sup>23</sup> CB408

the injuries may properly be called upon to meet the inference of negligence by giving an explanation of their conduct.<sup>24</sup>

a. I.e., Burden shifts to defendants.

**c. IIED/NIED**

i. Emotional distress

1. May be awarded as parasitic damages if attached to negligence claim.

a. Pain & suffering

b. Emotional suffering can attach to the negligence cause of action  
BUT

c. May also be a stand along LCH.

**d. Prenatal Harm**

i. Baby/Child: Post-Birth Injury

ii. Parents: Wrongful Conception

1. Most frequently from botched sterilization procedures.

2. LCH isn't physical as much as pecuniary.

iii. Parents: Wrongful Birth

**e. Loss of Consortium**

i. If one member of a relationship is tortiously injured, the non-injured party has a cause of action to recover for damage to their relational interest.

1. **Filial consortium** not included because loss of consortium does not apply between parents and children.

a. *Exception*: Some courts will allow.

ii. Typically limited to spousal relationships.

iii. Physical manifestations not required.

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<sup>24</sup> CB413

## Cause in Fact

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*Actual cause issues are for the fact finder, unless there is no triable issue of fact.*

### I. Was the defendant's breach the cause in fact of the plaintiff's legally cognizable harm?

1. Tests for cause in fact:
  - a. The "But-For" Test
    - i. Vast majority of cases
      1. The plaintiff must show that "but for" defendant's breach, they would not have experienced the LCH.
      2. There may be multiple interdependent but for causes.
    - b. The Substantial Factor Test
      - i. Multiple independently sufficient causes
        1. In limited jurisdictions or circumstances, the plaintiff may instead show that the defendant's breach was a substantial factor in causing plaintiff's harm.
      - ii. **Do not use; UNLESS there are multiple independent sufficient causes. THEN USE REST. 3d**
    - c. Restatement (Third) of Torts
      - i. If tortious conduct of tortfeasor A fails the "but-for" test only because there is another set of conduct also sufficient to cause the harm, A's conduct is still a cause in fact or factual cause.
2. Proof of causation
  - a. A preponderance of the evidence
  - b. Alternative causes and the **shifted burden of proof**.
    - i. Where two or more tortfeasors acting independently of each other cause an injury to plaintiff, they are not joint tortfeasors and plaintiff must establish the portion of the damage caused by each, even though it is impossible to prove the portion of the injury caused by each.
      1. Defendants in such cases may be treated as liable on the same basis as joint tortfeasors.
      2. If defendants are independent tortfeasors and thus each liable for the damage caused by themselves alone, and, at least, where the matter of apportionment is incapable of proof, the innocent wronged party should not be deprived of their right to redress.
      3. The wrongdoers should be left to work out between themselves any apportionment.

## Scope of Risk

### Proximate Cause

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*Liability for negligence is liability for the unreasonable risks the defendant created, not for reasonable risks or for those that were unforeseeable.<sup>25</sup>*

*Scope of Risk elements (1) and (2) are for the fact finder, unless there is no triable issue of fact.*

### **I. Was the harm caused by the defendant's breach within the scope of the risk of defendant's negligent conduct?**

1. Type of harm suffered by the plaintiff must fall within the scope of the risk that defendant negligently created (a reasonable person would have foreseen harm of the same general type)  
**AND**
2. Plaintiff must fall within the class of persons risked by the defendant's negligence.
  - a. A reasonable person would have foreseen harm of the same general type to the class of people which plaintiff belongs.
3. *Special Rules:*
  - a. **Superseding Cause:**
    - a. An intervening act or force can fall within the scope of the risk the defendant negligently created so long as the intervening act or force, or one of the same general type, is foreseeable.
      1. In some cases, courts disclaim plaintiff's recovery entirely on superseding causes.
      2. A superseding cause breaks the causal chain between the injury/harm of the plaintiff and the defendant's conduct.
    - b. The precise manner in which the harm occurs need not be foreseeable.
      1. Unless the court determines otherwise; they often do.
      2. It still must generally fall within the scope of general foreseeability.

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<sup>25</sup> CB237



## Negligence | Res Ipsa Loquitur

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*Res Ipsa is unavailable when (1) no investigation has been conducted by the party bringing suit or (2) there are sufficient facts and evidence of what happened.*

### **I. The accident must be one which ordinarily does not happen unless there is negligence – inferring negligence generally.**

1. The facts as we know them, combined with common knowledge or expert testimony, give rise to an inference that it is more likely than not that someone was negligent.

### **II. Other possible causes of the accident, including the conduct of the plaintiff and other persons, have been sufficiently (but need not be completely) eliminated by the evidence – inferring a defendant’s negligence.**

1. The facts as we know them, combined with common knowledge or expert testimony, give rise to an inference that the defendant was more likely than not a person who was negligently responsible for the accident.
2. We have to be mindful that there can be more than one person who is negligent – e.g., a plaintiff or an additional defendant – and that multiple negligent parties will not necessarily preclude Res Ipsa.
  - a. If a plaintiff’s comparative negligence does not lessen the probability that the defendant was also negligent, then requirement (II) is met as to that defendant.
  - b. The same goes for a case where there are multiple defendants, all of whom allegedly contributed to the plaintiff’s injury.
    - i. If defendant A’s negligence does not lessen the probability that defendant B was also negligent, then requirement (II) is met as to defendant B.
    - ii. Assuming the converse is true – that defendant B’s negligence does not lessen the probability that defendant A was negligent – then requirement (II) will be satisfied as to defendant A.
    - iii. Ultimately, then, it might be satisfied as to both defendants A and B.
  - c. Cases involving serial control usually differ. If a plaintiff’s injury happened while in the custody of defendant A OR B, but NOT BOTH, and one of those defendants is therefore innocent, then requirement (II) is not satisfied. We cannot say, when looking at defendant A, that it is more likely than not that they were the negligent party. Nor can we say that of defendant B. The probabilities are 50-50 and does not, therefore, meet the preponderance of the evidence requirement.
    - i. The *Collins* court departs from this reasoning and allows Res Ipsa. The Restatement Third believes that the *Collins* rule should be adopted more broadly to factually similar cases; where the two *ds* have a special relationship.
      1. One area in which a *Collins*-like rule does receive widespread acceptance is in **Medical Res Ipsa**.
  - d. Exclusive control is the one way to strengthen the inference that the defendant was negligent, BUT IS NOT REQUIRED.
3. Investigation: As with all cases, you must investigate for the facts.

# Affirmative Defenses to the Prima Facie Case of Negligence

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## *Traditional Contributory Negligence*

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*Traditional contributory negligence will be the law of Oregon UNLESS a statute is given that indicates otherwise.*

*Contributory negligence, if proven, cancels out any recovery of damages by the plaintiff UNLESS the plaintiff can prove either of the two complete defenses to contributory or comparative negligence, in which case the plaintiff may recover.*

*The plaintiff need only be slightly contributorily negligent; it is a complete defense.*

### **I. Duty**

1. The plaintiff *always* owes a duty to themselves; UNLESS
  - a. Special Relationship
    - i. Children do not have a duty to protect themselves from sexual abuse by adults.<sup>26</sup>
    - ii. Landowners owe no duty to trespassers to refrain from negligent conduct.<sup>27</sup>
      1. Only in jurisdictions that classify trespasser, licensee, and invitee.
2. The standard of care is *typically* reasonable person unless the standard is changed.
  - a. Physical infirmity
  - b. Mental condition
  - c. Per Se
  - d. See Standard of Care on page X

### **II. Breach**

1. Did the plaintiff breach their duty to themselves; AND
2. Fail to use the standard of care?

### **III. Legally Cognizable Harm**

1. Did the plaintiff suffer an LCH?
  - a. See LCH on page X.

### **IV. Cause in Fact**

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<sup>26</sup> CB304

<sup>27</sup> CB306 Note 1

1. Did the plaintiff's contributory negligence concur and cooperate with defendant's negligence to form a cause in fact of their LCH?

## V. Scope of Risk

1. Was the plaintiff's LCH within the scope of risk of their own contributory negligence?
  - a. Contributory negligence occurs where the plaintiff's breach *concurs and cooperates* with the defendant's negligence to form a proximate cause of the LCH.<sup>28</sup>

## Comparative Negligence

(1) Pure Comparative Negligence, (2) Greater Than, OR (3) Greater Than or Equal To Comparative Negligence

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### **Defendant must prove all elements of negligence as outlined in Traditional Contributory Negligence.**

1. *Is the plaintiff's claim against the defendant(s) barred?*
2. *What is the maximum the plaintiff can recover?*
3. *From whom can the plaintiff recover it?*

*Factors for assigning percentages of responsibility to each person whose legal responsibility has been established include:*

- (a) *the nature of the person's risk-creating conduct, including any awareness or indifference with respect to the risks created by the conduct and any intent with respect to the harm created by the conduct; and*
- (b) *the strength of the causal connection between the person's risk-creating conduct and the harm.*<sup>29</sup>

## Pure Comparative Negligence Jurisdictions

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### I. Pure Comparative Negligence

1. The plaintiff may be significantly negligent and still recover for the defendant's share of negligence. HOWEVER;
  - a. In particular cases, a court may conclude that reasonable people would necessarily find contributory negligence or that the plaintiff's comparative negligence is so great that as a matter of law a directed verdict or summary judgement for the defendant is appropriate.<sup>30</sup>

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<sup>28</sup> CB289

<sup>29</sup> Restatement (Third) of Torts § 8; CB293

<sup>30</sup> CB291

## **II. Recoverable Damages**

1. Plaintiff may recover damages proportionate to the defendant's share of negligence.

## **Greater Than Bar Comparative Negligence Jurisdictions**

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### **I. Greater Than Bars**

1. Plaintiff may NOT recover damages for negligent acts of the defendant(s) IF;
  - a. The plaintiff's assigned share of fault is greater than 50%.

### **II. Aggregate**

1. Plaintiff need only to show their comparative negligence is less than or equal to 50% to recover from all defendants.
2. Plaintiff may recover damages proportionate to the combined defendant's share of negligence of all defendants no matter if P's negligence is less than any one defendant's.

### **III. Non-Aggregate**

1. Plaintiff must show that their share of negligence is less than each individual defendant from which they may recover damages from.
  - a. Greater than bar still applies.
2. When plaintiff is less negligent than some defendants but more negligent than others, they may only recover from those defendants with share of liability is greater than plaintiff's less any defendant that has a share that is less than the plaintiff, which the plaintiff can't recover from that defendant.

## **Greater Than or Equal To Bar Comparative Negligence Jurisdictions**

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### **I. Greater Than or Equal To Bars**

1. Plaintiff may NOT recover damages for negligent acts of the defendant(s) IF;
  - a. The plaintiff's assigned share of fault is greater than or equal to 50%.

### **II. Aggregate**

1. Plaintiff need only to show their comparative negligence is less than 50% of all defendants.
2. Plaintiff may recover damages equal to the combined proportion of fault assigned to the defendants.

### **III. Non-Aggregate**

1. Plaintiff must show that their share of negligence is less than each individual defendant from which they may recover damages from.
  - a. Greater than or equal to bar still applies.
2. When plaintiff is less negligent than some defendants but more negligent than others, they may only recover from those defendants with a share of liability that is greater than plaintiff's less any defendant that has a share that is less than the plaintiff, which the P can't recover from that D.

## **Apportionment of Liability for Contributory & Comparative Negligence**

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*The apportionment of negligence is solely a matter for the fact finder, AND its action will not be disturbed on appeal if it is supported by credible evidence and bears a reasonable relationship to the respective elements of negligence proved at trial.<sup>31</sup>*

### **1. Joint and Several Liability**

- a. Plaintiff may recover the full award of damages from one or more of the defendants.
  - i. Contribution or indemnity claims may follow between defendants to recover the non-paying defendants' share of liability.
    - a. Cont. & Indem. Claims Not on exam.
  - ii. The plaintiff may have the prerogative to decide which of the defendant(s) to recover from.

### **2. Proportionate Share Liability | Several Liability**

- a. Each defendant is *only* liable for their assigned share of liability; AND
- b. Plaintiff must collect the amount each defendant is liable for from the respective defendant.
  - i. **CANNOT collect full sum from one or some.**
- c. Depending on jurisdiction.

### **3. Strict Liability**

- a. See page 34.

### **4. Vicarious Liability**

- a. See page 42.

## **The Two Complete Defenses to**

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<sup>31</sup> CB290

## Contributory & Comparative Negligence<sup>32</sup>

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1. The **Last Clear Chance** Defense (MOSTLY applies to traditional cont.)
  - a. Plaintiff **MUST** show:
    - i. Plaintiff put themselves in peril, AND
      1. Helpless
    - ii. From which they cannot reasonably escape; AND
    - iii. Defendant is or should have been aware of the plaintiff's peril; AND
      1. Had the last clear chance to avoid injury
    - iv. Then act negligently that harms the plaintiff.
  - b. Courts have almost uniformly declined to recognize this defense.
2. The **Reckless Defendant** Defense
  - a. IF the defendant(s) conduct is more than negligent (reckless or worse);
  - b. Contributory negligence is cancelled out; AND
  - c. Plaintiff can recover 100% of the damages.

## Assumption of Risk

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### I. Contractual (Express) Assumption of Risk

1. Survives as a separate, complete defense in all jurisdictions; UNLESS
  - a. The contract is void as a matter of public policy. Factors: *Tunkle v. Regents of University of California*.
    - i. The business is of a type generally thought suitable for public regulation.
    - ii. Defendant's service is of great importance to the public, and perhaps a practical necessity.
    - iii. Defendant is holding itself out as performing the service generally for the public.
    - iv. The need for the service and the economic setting give the defendant decisive advantage of bargaining strength.
      1. **ONLY ONE** of the factors necessary.
  - b. The harm/negligence is outside the scope of the contract.
  - c. The contract does not meet the requirements of a statute that may be present in that jurisdiction.
  - d. The pre-injury release is unenforceable if:
    - i. The rules of the contract limit the waiver; OR
    - ii. If the waiver offends public policy.
  - e. Parental Waiver for Children<sup>33</sup>
    - i. A parent's pre-injury release of a child's rights is invalid.
    - ii. A parent's agreement to indemnify the tortfeasor may also be stricken based on public policy.
2. Exculpatory Contract
  - a. **MUST** meet higher standards for clarity than other agreements.

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<sup>32</sup> CB309-311

<sup>33</sup> CB319 Note 7

3. Expressed in writing or orally.

## II. Implied Assumption of Risk

1. Appears to survive as a separate, complete defense in *traditional* contributory negligence jurisdictions.
  - i. UNLESS against some public policy.
  - ii. Forms of traditional complete and separate defense:
    1. Apply the comparative fault rules, OR
    2. Holding that the defendant had no duty of care, OR
    3. Holding that the defendant did not breach their duty.
2. Does not survive as a complete defense in comparative negligence jurisdictions.
  - iii. Most simply “merge” the doctrine into comparative fault; this can happen one of two ways.
    1. Eliminate it, folded into comparative negligence; OR
    2. Still a separate defense with three factors but consequences are no longer an all-or-nothing; it will operate like comparative negligence in regard to assignment of fault.
  - iv. But old scenarios may now be treated as creating no duty owed to the plaintiff, a limited duty, or no breach as a matter of law.
3. **Sports Personal Injury**<sup>34</sup>
  - v. If a participant in a professional sports event makes an informed estimate of the risks involved in the activity and willingly undertakes them, then there can be no liability if they are injured as a result of those risks.
  - vi. Primary assumption of risk or limited duty rules are sometimes applied to bar claims by spectators injured by risks inherent in the game; UNLESS
    1. A spectator may also recover if the defendant has (recklessly) INCREASED the inherent risk.

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## Statute of Limitations

### I. Accrual Rule

1. The statute of limitations begins when the cause of action occurs.
  - a. All elements of the tort must be present at that point.
  - b. Plaintiff does not need to be aware that they have a cause of action.

### II. Discovery Rule

1. The statute of limitations is delays the accrual of the claim at least until;
  - a. All the elements of the tort are present; AND
  - b. The plaintiff discovers, OR
  - c. A reasonable person should have discovered
    - i. The injury.

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<sup>34</sup> CB328 Notes 6 & 8

- ii. Some jurisdictions include:
    - 1. Defendant caused the LCH; AND
    - 2. Defendant's tortious conduct had a causal role OR
    - 3. Defendant's conduct may have a causal role enough to require further investigation.
- 2. Latent potential is judged by a preponderance of the evidence.
- 3. Exceptions:
  - a. Jurisdictionally: The identity of the defendant is not an element; therefore, ignorance of that fact does not delay accrual.

### **III. Med Mal**

- 1. Continuous Treatment<sup>35</sup>
  - a. Some jurisdictions have adopted a rule that delays the start of the statute of limitations until the treatment for which the patient consulted the physician has been concluded.

### **IV. Latent Potential Harm**

- 1. Plaintiff may recover damages that will occur in the future IF:
  - a. The proof shows such damages to be more likely than not.
    - i. This may limit what a plaintiff can recover because they will need to file their claim within the statute of limitations but the latent harm may be difficult to prove, especially in regard to harms that take a long time to manifest.
- 2. Enhanced Risk or Reduced Chance Recovery
  - a. Same elements above but including:
    - i. Future injuries are reduced to reflect their probability.
      - 1. Ex: 40% probability with damages estimated at \$100 resulting in recovery of \$40.

### **V. Negating the Statute of Limitation<sup>36</sup>**

- 1. Tolling Agreements
  - a. Contractual Waiver of Statute of Limitations Defense
    - i. Parties are free to agree not to raise the defense of statute of limitations
      - 1. Judges will uphold.
- 2. Equitable Estoppel
  - a. A delay in filing an action that is induced by the defendant;
  - b. The defendant misled the plaintiff; AND
  - c. The plaintiff must have acted on the information in good faith to the extent that they failed to pursue their action in a timely manner.
- 3. Force or Threat
  - a. If defendant prevented suit by force or threat, they might be estopped from pleading statute of limitations as defense.

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<sup>35</sup> CB331 Note 3

<sup>36</sup> CB342-343



4. Concealment
  - a. Defendant has made a false representation or has concealed material facts;
  - b. The plaintiff lacks knowledge of the true facts;
  - c. The defendant intended the plaintiff to act on such representations; AND
  - d. The plaintiff did in fact rely upon such representations to their prejudice.
5. Equitable Tolling
  - a. Despite all due diligence, the plaintiff is unable to obtain vital information bearing on their claim.
6. Sexual Abuse Victims
  - a. Controversial - policy
7. Tolling for Disabilities
  - a. Minors
  - b. Unsound mind
    - i. Danger to themselves or others
    - ii. Must be unable to manage their daily affairs or comprehend their legal rights or liabilities.
8. Pending class action certification
9. Grace Periods
  - a. Merely extends; does not stop the clock.

## **VI. Other Limits**

1. The Notice Bar
  - a. Statute of limitations may be shortened by the 30-day notice requirement.
    - i. Not paused or extended.
2. The Pre-Accrual Bar
  - a. Statutes of Repose
    - i. The statute of limitations does not begin to run until the harm to person or property becomes apparent or a reasonable person should have known of the harm.

# Strict Liability

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*Single intent intentional torts have qualities of strict liability from originating via the writ of trespass.*

*The discrepancy in the rules for contributory negligence on strict liability is that traditional contributory negligence is not available as a defense on strict liability but jurisdictions with comparative negligence, it can be.<sup>37</sup>*

*Strict liability is liability without fault so long as  $\delta$  was a cause in fact of the  $\pi$ 's harm. Essentially a negligence claim with all the same elements with the exception of the standard of care; **the standard of care is strict liability and there is no analysis on breach.***

## I. Strict Liability for Trespassory Torts and the Advent of Fault Theory

1. Strict liability under trespass at early common law
  - a. Text: INSERT
2. Strict liability applied and signs of change to come
  - a. *Weaver*
3. Change Arrives: Fault Theory Adopted
  - a. *Brown*

## II. Strict Liability After *Brown v. Kendall*

1. Trespassing Animals and Dangerous Animals
  - a. Restatement (Third) of Torts § 21 | Intrusion by Livestock of Other Animals
    - i. An owner or possessor of livestock or other animals, except for dogs and cats, that intrude upon the land of another is subject to strict liability for physical harm caused by the intrusion.
      1. Scope of Risk
  - b. Restatement (Third) of Torts § 22 | Wild Animals
    - i. An owner or possessor of a wild animal is subject to strict liability for physical harm caused by the wild animal.
    - ii. A wild animal is an animal that belongs to a category of animals that have not been generally domesticated and that are likely, unless restrained, to cause personal injury.
  - c. Restatement (Third) of Torts § 23 | Abnormally Dangerous Animals
    - i. An owner or possessor of an animal that the owner or possessor knows or has reason to know has dangerous tendencies abnormal for the animal's category is subject to strict liability for physical harm caused by the animal if the harm ensues from that dangerous tendency.
    - ii. Physical harm
      1. To person; OR

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<sup>37</sup> CB 690 – 691; Notes from 11/14/2017

- 2. Property
- iii. The One Free Bite Rule:
  - 1. The first time an abnormally dangerous animal attacks someone, strict liability does not apply but places upon the owner or possessor the knowledge that the animal is abnormally dangerous.
  - 2. The second time, strict liability applies.
- 2. Abnormally dangerous uses
  - a. Restatement (Third) of Torts § 20 | Abnormally Dangerous Activities
    - i. An actor who carries on an abnormally dangerous activity is subject to strict liability for physical harm resulting from the activity.
    - ii. An activity is abnormally dangerous IF:
      - a. The activity creates a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors; AND
      - b. The activity is not one of common usage.
  - b. There are no real reasonable steps to prevent harm to others and the burden of not doing it is against the social benefits.

### **III. Strict Liability Under Comparative Responsibility**

- 1. Restatement (Third) of Torts § 25 | Comparative Responsibility
  - a. If the plaintiff has been contributorily negligent in failing to take reasonable precautions, the plaintiff's recovery in a strict liability claim under §§ 20-23 (above) for physical or emotional harm is reduced in accordance with the share of comparative responsibility assigned to the plaintiff.

# Informed Consent

## Medical Malpractice

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### I. Med Mal

1. The Basic Elements
  - a. Defendant fails to disclose required information;
    - i. Patient's Rule, OR
    - ii. Physician's Rule
  - b. Plaintiff must suffer an LCH
    - i. LCH must result from the risks from which the plaintiff was not informed.
      1. When an unrevealed risk does not materialize, there is no LCH.
  - c. Plaintiff would have rejected proposed treatment if they had known of that risk AND a reasonable person would have also rejected the proposed treatment if they had known of the risks.
2. When Disclosure is Necessary
  - a. The Patient Rule: Physicians have a duty to disclose all significant medical risks that the defendant knows or should know about AND that is material to an intelligent decision by the patient.
    1. *See "Lost Causation" (2)(a).*
      - i. Reasonable: Information possessed by the average physician in the discipline.
      - ii. Materiality: A reasonable person in the patient's position would find it important to know when deciding to undergo the procedure.
      - iii. *PLUS*: Knowledge of the MD prior to care that the patient gave notice of its importance to them.
      - iv. Lay persons can establish what a reasonable patient would have done.
  - b. The Physician Rule: A physician or medical professional must disclose to their patient only such information as is customarily disclosed in similar circumstances.
    - i. *Traditional rule.*
    - ii. Physician Privilege: The physician may keep information from the patient when the sound medical judgement might indicate that disclosure would complicate the patient's medical condition or render them unfit for treatment.
      1. *Exception*: Paternal/maternal notion that the physician may remain silent simply because divulgence might prompt the patient to forego treatment the physician *feels* the patient really needs.
3. Harm Caused by Nondisclosure
  - a. Lost Causation: Plaintiff has to be injured in a way that results from the risks that were not *disclosed*.
  - b. Transaction Causation: Plaintiff must prove that they *would not have engaged* in the procedure, nor would a reasonable person, had the physician told them of the risks.

# Emotional Distress

## IIED, NIED & Third Persons

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### Intentional Infliction of Emotional Distress

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#### I. The General Elements

1. Defendant intended to cause the plaintiff or recklessly causes the plaintiff severe emotional harm;
  - a. Intent
    - i. Desire OR
    - ii. Knowledge with a substantial certainty OR
    - iii. Recklessness
      1. Conscious disregard of risk
      2. Has to know of high risk of severe emotional distress and disregard
2. Defendant engaged in extreme and outrageous conduct; and
3. Plaintiff actually and justifiably suffered severe emotional distress, i.e., an ordinary, reasonable person would have also suffered severe emotional distress.
  - a. Exception under hypersensitive plaintiff rule.
    - i. Defendant must be aware of hypersensitivity

#### II. Third Persons

1. The Presence Rule<sup>38</sup>
  - a. Where such conduct is directed at a third person, the actor is subject to liability if they intentionally or recklessly cause severe emotional distress:
    - i. To a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, OR
    - ii. To any other person who is present at the time, if such distress results in bodily harm.

### Negligent Infliction of Emotional Distress

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#### I. Duty

1. Defendant's legal duty to plaintiff;
  - a. Yes; unless,
  - b. A no-duty rule applies.
2. Standard of Care

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<sup>38</sup> Restatement (Second) of Torts § 46; CB586-587

- a. Usually reasonableness standard; unless,
- b. Another standard applies.

## II. Breach

- 1. Defendant breached the standard of care and either;
  - a. Placed the plaintiff at risk of immediate physical bodily harm; OR
    - i. Some jurisdictions additionally require that the plaintiff be put in fear or apprehension for their own safety at the time or soon after.
  - b. In some special cases, there need not be a risk of physical harm to the plaintiff but the case must involve:
    - i. A special relationship; OR
      - 1. *Burgess v. Superior Court*
    - ii. Mishandling of dead bodies; OR
      - 1. *Often couched as involving a special relationship.*
    - iii. The erroneous notice of death of a close relative.
      - 1. *Johnson v. State*

## III. Legally Cognizable Harm

- 1. Plaintiff actually and justifiably suffered serious emotional distress, *i.e.*, an ordinary, reasonable person would have also suffered serious emotional distress, and either (depending on jurisdiction);
  - a. Physical impact; OR
    - i. Nearly obsolete and certainly inapplicable under 1(b).
  - b. Physical manifestation; OR
    - i. Serves as objective proof of emotional harm.
  - c. Emotional distress alone suffices as a legally cognizable harm
    - i. Rest. 3d

## IV. Cause in Fact

- 1. Defendant's negligence was a cause in fact of plaintiff's emotional distress.

## V. Scope of Risk

- 1. Plaintiff's emotional distress falls within the scope of the risk.

## Third Persons NIED & IIED: Sudden & Serious Injury

Plaintiff Suffers Serious Emotional Distress

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- 1. Defendant committed a tort of negligence to a THIRD person, that is to say:
  - a. Defendant owed a duty to the third person, breach, LCH, CIF, and SOR; AND
  - b. The LCH the third person suffered must be a sudden and serious bodily injury.
    - i. **Not just a regular LCH.**

2. Plaintiff is closely related to the injured third person, perceived the injury-causing event contemporaneously; AND
  - a. In some jurisdictions, is present at the scene.
3. Plaintiff LCH: Plaintiff actually and justifiably suffered serious emotional distress.
  - a. i.e. An ordinary, reasonable person would have suffered serious emotional distress; AND EITHER (depending on jurisdiction)
    - i. Physical manifestations; OR
    - ii. Emotional distress alone suffices as legally cognizable harm.
4. Plaintiff CIF: Defendant's negligence was a cause in fact of plaintiffs' emotional distress.
5. Plaintiff SOR: Plaintiff's emotional distress falls within the scope of the risk.

# Death

## Wrongful Death and Survival Actions

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*Wrongful death has no elements as to the way in which the death occurs, it must piggyback on another claim.*

*Survival statute and wrongful death statutes can piggy back; ex. If parent dies and then kid dies, can kid's estate pursue wrongful death of parent? Yes, **IF** jurisdiction allows.<sup>39</sup>*

### I. The *Traditional Common Law Rules*

1. If an injured person died before receiving judgement against the defendant, their cause of action died with them.
2. If an injured person remained alive after injury but the defendant died before a judgement was rendered against them, the plaintiff's cause of action died as well.
3. There was no separate cause of action on behalf of those who were dependent upon the decedent.

### II. Wrongful Death

1. Wrongful Death *Statutes*: Direct/Separate Claim for Third Party Harm
  - a. *Resolves the third traditional rule above.*
  - b. Creates *new* claim for certain designated beneficiaries (determined by statute between those with standing and those without but with right to monetary damages from estate) as identified in the statute
    - i. Statute might allow for loss of consortium;
    - ii. Loss of consortium is its own LCH.
      1. If in the statute
2. Damages: Determined by statute and common law
  - a. Traditionally the statutes limited the recovery to pecuniary losses suffered by dependents or those who would inherit.<sup>40</sup>
  - b. Contemporary wrongful death statutes tend to address a broader scope of injuries, including those considered non-pecuniary compensatory damages.<sup>41</sup>
    - i. Punitive damages
      1. Generally rejected under most original wrongful death statutes.
    - ii. Damages for the mental anguish or grief of the survivors;
      1. Generally rejected under most original wrongful death statutes.
    - iii. **Loss of consortium**, which might include,
      1. Loss of society or companionship
      2. Loss of services, and

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<sup>39</sup> CB634

<sup>40</sup> CB631, N3

<sup>41</sup> Weigel, CB629



3. Loss of guidance and care.<sup>42</sup>
  - c. Loss-to-Survivors:<sup>43</sup>
    - i. Apart from relatively minor items such as funeral expenses, most states measure economic loss by the loss of support to dependents.
  - d. Loss-to-the-Estate:
    - i. Measured by the loss of projected lifetime savings of the deceased.
      1. Most jurisdictions calculate the loss by determining the deceased's probable lifetime earnings and then deduct the expenses the decedent would have had in maintaining themselves.
3. *If no statutes, common law traditional rules above.*

### III. Survival Actions

1. Survivor *statutes*: Claim from Estate for Harm to Deceased
    - a. *Resolves first two traditional rules above.*
    - b. Types of claims that can be brought by survivor and who can bring/continue suit are determined by the statute *as the representative of the estate.*
  2. Damages:
    - a. Compensatory:
      - i. Pecuniary
        1. Statutes ordinarily limit damages to those injuries suffered before the person died.
          - a. Ex: If person dies instantaneously, compensatory damages are not typically available.
      - ii. Non-Pecuniary
        1. Pain & Suffering
          - a. Must be conscious of pain and suffering.
    - b. Punitive
      - i. Might be provided by statute.
    - c. New Types:
      - i. A few states authorize:
        1. Loss of Life
          - a. Designed to compensate a decedent for the loss of the value that the decedent would have placed on their life.
            - i. Available even if decedent died instantly.
3. *If no statutes, common law traditional rules above.*

### IV. Defenses

1. Ordinarily can raise comparative negligence, assumption of risk, *of deceased* etc.
2. Can't under traditional contributory negligence but others you can.

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<sup>42</sup> CB632, N7

<sup>43</sup> CB631, N2

# Vicarious Liability

*Respondeat Superior* is Largest Type of VL

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*Not limited to intentional torts or negligence.*

## I. The Basic Principle

1. A defendant is responsible for harm caused by the tortious conduct of:
  - a. Tortfeasors who are in an **actionable relationship** with the defendant; AND
  - b. Which occurs while the tortfeasor is acting **within the scope of that relationship**.

## II. Actionable Relationship

1. In order for an actionable relationship to exist, at least one of the following circumstances must be present:
  - a. **Master-Servant**: The following factors are sometimes considered when a right to control is unclear in assessing whether an actionable relationship exists:
    - i. Defendant supplied the equipment, tools, and place of work;
    - ii. The tortfeasor was paid by the hour rather than by the job;
    - iii. The work being done by the tortfeasor was part of the regular business of defendant;
    - iv. Defendant had an unlimited right to end the relationship with the tortfeasor;
    - v. The work being done by the tortfeasor was the only occupation or business of that person;
    - vi. The kind of work performed by the tortfeasor is usually done under the direction of a supervisor rather than by a specialist working without supervision;
    - vii. The kind of work performed by the tortfeasor does not require specialized or professional skill; and
    - viii. The services performed by the tortfeasor were to be performed over a long period of time.
  - b. **Independent Contractors**: Although a landowner or principle typically is not in an actionable relationship with an independent contractor, with *exceptions*:
    - i. The landowner or principal retains actual control over the manner and means of doing the work, and not just a right to specify a result;
      1. In such a case where the landowner/principal retains control, the employer is responsible for the negligence of the independent contractor even though;
        - a. The particular control exercised AND
        - b. Its manner of exercise,
          - i. Had no causal relationship with the hazard that led to the injury.
      - ii. The landowner or principal knowingly hires an incompetent contractor
        1. Ex: Unqualified or unlicensed contractor; OR
      - iii. Where the work is inherently dangerous
        1. Not on exam

- c. **Apparent Relationship:** The defendant acted as if the tortfeasor was in a master-servant or principal-agent relationship. All of the following factors **MUST** be present:
  - i. Defendant intentionally or carelessly created the impression that the tortfeasor was defendant's employee or agent;
  - ii. Plaintiff reasonably believed that the tortfeasor was defendant's employee or agent; **AND**
  - iii. Plaintiff was harmed because they reasonably relied on their belief.
- d. **Partnerships:** The defendant and the tortfeasor are partners in a partnership.
  - i. The partnership business entity serves as the employer and all partners are liable.
- e. **Joint Enterprise:** All members of a joint enterprise are liable when persons outside the enterprise are injured.
  - i. Joint enterprises exist when the following are satisfied:
    - 1. An agreement, expressed or implied;
    - 2. There is a common purpose;
    - 3. There is a community of interest; **AND**
    - 4. There is equal right of control.
  - ii. When members of the enterprise are injured:
    - 1. There is no imputation of negligence among the enterprisers themselves.
- f. **Conspiracy, Aiding and Abetting, etc.:**
  - i. Conspirators or those who act in concert to commit a tort or crime are partners, as it were, in an illegal or tortious enterprise.
  - ii. Aiders and abettors are in much the same position.

### III. Within the Scope of the Relationship

#### 1. General Rule

- a. A tortious act occurs within the scope of the relationship if either;
  - i. It is reasonably related to the kinds of tasks that the tortfeasor was employed or expected to perform; **OR**
  - ii. It is reasonably foreseeable in light of the defendant's business or the tortfeasor's job responsibilities.
  - iii. The tortfeasor's conduct was in furtherance of the interests of their employer.<sup>44</sup>
    - 1. An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which they are employed.

#### 2. Special Rules

##### a. Prohibited Acts

- i. The fact defendant had prohibited the tortfeasor from engaging in the act that caused the harm is not dispositive.
- ii. A tortfeasor's unauthorized or criminal conduct may still be within the scope of relationship.

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<sup>44</sup> *Edgewater*, CB648

1. **Intentional torts** by employees do not usually give rise to vicarious liability of employers, simply because such acts are motivated by pure personal considerations and have little connection to the employment and thus fall outside the scope of employment.<sup>45</sup>
- b. Deviations
- i. A tortfeasor's conduct that slightly deviates from their work is to be expected.
    1. Ex: Acts that are necessary for an employee's comfort, health, and convenience while at work are within the scope of the relationship.
      - a. Ex: Smoking cigarette case
- c. Going and Coming
- i. In general, a tortfeasor is not acting within the scope of their relationship while traveling to and from the workplace, UNLESS either;
    1. The tortfeasor, while commuting, performs a concurrent service for defendant that would have necessitated a trip by another employee OR defendant themselves, had the tortfeasor been unable to perform it; OR
      - a. *Hinman*: The tortfeasor, while commuting, benefits the defendant by working in a distant labor market and which is reflected by the fact the defendant has paid for both the tortfeasor's travel time and expenses.
      - b. The benefit need only be to the defendant and not to the tortfeasor.
        - i. The fact that the employee receives personal benefits is not determinative when there is also a benefit to the employer.<sup>46</sup>
    2. The defendant requires the tortfeasor to drive their personal vehicle to and from the workplace so that the vehicle may be used for work-related tasks.
    3. Where the employer and employee have made travel time part of the working day by their **contract**, the employer should be treated as such during the travel time, and it follows that so long as the employee is using the time for the designated purpose, to return home, the doctrine of respondeat superior is applicable.<sup>47</sup>
- d. Social and Recreational Activities
- i. Social or recreational activities that occur after work hours are within the scope of the relationship IF:
    1. They are carried out with the defendant's stated or implied permission; AND
    2. They either provide a benefit to the defendant or have become customary.

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<sup>45</sup> CB652

<sup>46</sup> *Hinman*, CB644

<sup>47</sup> *Hinman*, CB645

# Damages & Other Remedies to Torts

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*All remedies may be both backward and forward looking.*

*Damages are typically determined by a jury with the exception of bench trials; Appeals pending.*

*When damages are awarded, those damages are final unless there is a statute that says otherwise, which is extremely rare. Excludes equity remedies such as injunctive relief.*

## Nominal Damages

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*Symbolic.*

*Plaintiff made out the case and succeeded but no damage resulted from the incident, making compensatory damages unavailable.*

*Must be more than zero but not a lot.*

## Compensatory Damages

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### I. Pecuniary Compensatory Damages

#### 1. Lost Wages

##### a. Lost Wages

- i. Wages lost from work due to personal injury **before** trial

##### b. Loss of Earning Capacity

- i. Wages lost from work due to personal injury **after** trial
- ii. General Considerations in Calculation:
  1. Reasonable estimation of potential earnings lost
    - a. Easy when a career is established.
    - b. Difficult when no career is established yet.
      - i. Ex: 5-year-old child – policy Q
  2. Multiplied by number of years expected they would have worked.
  3. Add potential inflation.
  4. Subtract potential interest received from investment of funds.
  5. Subtract potential income the plaintiff is still capable of earning, if any.
  6. Taxes are not taken into account, plaintiff does not need to pay federal taxes on personal injury damages.
    - a. Juries might think that taxes are a consideration and thus make the award higher.

## 2. Medical Expenses

- a. Incurred and Potential Medical Expenses
  - i. When there is personal injury involved, a plaintiff may recover;
    1. Medical expenses already incurred; AND
    2. Reasonably certain future medical expenses.
      - a. Based on a preponderance of the evidence.
- b. Incurred and Potential **Medical Monitoring**
  - i. When no or minor personal injuries occur but the incident resulted in a chance of medical injury in the future;
    1. Some courts allow recovery of pecuniary damages to cover medical expenses incurred to monitor the potential health problems that may arise.

## 3. Property, Land and Chattels

- a. Diminution of value
- b. Injunctive relief possible but rare; *see "Injunctive Relief" below.*

## II. Non-Pecuniary Compensatory Damages

*Comes down to argumentation.*

### 1. Pain & Suffering

- i. Ex: Emotional distress
- a. MUST BE conscious of the pain & suffering
  - i. Policy Q w/ "Lost Enjoyment of Life"
- b. Backward looking:
  - ii. May recover for P&S incurred **before** trial.
- c. Forward looking:
  - iii. May recover for P&S incurred **after** trial.

### 2. Lost Enjoyment of Life

- a. Traditionally a subsection of P&S
- b. Jurisdictionally determined today
  - i. Policy Q w/ "Pain & Suffering"

### 3. Loss of Consortium

- i. Ex: Wrongful Death

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## Punitive Damages

"Punitive damages are generally not recoverable unless a cause of action for compensatory or nominal damages is established and then only if the defendant has a bad state of mind, variously described as willful, wanton, reckless, or malicious." CB208.

## The Duty to Mitigate

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*The plaintiff has a duty to mitigate their injury.*

1. The Three Prong Test
  - a. Plaintiff's *conduct* exacerbated their initial injury.
  - b. Plaintiff failed to take *reasonable* action to lessen the damages.
  - c. The failure on the part of the plaintiff *caused* the additional damages.
2. Liability
  - a. Traditional Contributory Negligence Jurisdictions
    - i. If plaintiff was negligent for worsening the injury, defendant is not liable for damages exceeding the initial injury.
  - b. Pure Comparative Negligence Jurisdictions
    - i. Calculation of shared liability by the jury.

## Injunctive Relief

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1. Transitory Torts
  - a. Unavailable
  - b. Except;
    - i. Continuing torts
      1. Ex: Trespass to land.

# Policy Issues of Torts

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Corrective Justice:

Distributive Justice:

Deterrence:

Administrative Efficacy:

Encourage Safer Practices:

Deep Pockets:

Control: